No. 11,693

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

G. W. HUME COMPANY,
Respondent,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F.L., and CALIFORNIA STATE COUNCIL OF CANNERY UNIONS, A.F.L.,
Intervenors.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT, G. W. HUME COMPANY.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR RESPONDENT, G. W. HUME COMPANY.

I. STATEMENT OF JURISDICTION.

Petitioner National Labor Relations Board has invoked the jurisdiction of this Court under Section 10 (e) of the National Labor Relations Act (49 Stat. 449, 29 U.S.C. 160 (e)), hereinafter called the Act.

Since the Board issued its Order on October 31, 1946, the Act has been amended by the Labor Management Relations Act of 1947. (Pub. L. No. 101, 80th Cong., 1st Sess., June 23, 1947, 29 U.S.C. A. Sec. 141 et seq. (1947 Supp.).)

II. STATEMENT OF THE CASE.

Two issues are involved in this proceeding.

For a number of years respondent had been a member of California Processors & Growers, Inc. (for convenience referred to hereinafter as the CP&G), an agency which served as the collective bargaining representative for respondent and a number of other canners operating in California's central valleys and the San Francisco Bay area. The collective bargaining contract negotiated in 1941 between the CP&G and certain organizations affiliated with the American Federation of Labor was commonly known as the "green book" contract. This was the agreement which, with amendments, was in effect at respondent's plant at Turlock, California, throughout the year 1945 when some of the incidents now before this Court occurred.

Operations under the "green book" contract were harmonious throughout the canning industry for a long period of time, until an unhappy jurisdictional conflict developed in 1945 in which the representation of the industry's 50,000 or more cannery workers became the stake. The conflict first appeared about

May, 1945, when a number of independent local organizations were established which sought to succeed to the existing AFL groups. Within a couple of months these independents virtually disappeared; their place, however, was taken by Food, Tobacco, Agricultural & Allied Workers Union (hereinafter referred to as FTA) a union affiliated with the CIO. Petitions for certification of representatives were filed with the Board, and during the fall of 1945 the jurisdictional conflict approached a climax. At respondent's plant the petition for certification of representatives was filed by FTA during the summer, and early in October the Board directed that an election be held throughout the industry-wide bargaining unit. The election of October, 1945, was subsequently determined by the Board to have been improperly conducted, due to the lack of adequate safeguards on the Board's part to insure a fair election, and the results were set aside as inconclusive on February 15, 1946. During the interval between the holding of the election and its formal invalidation by the Board the respondent, in response to a demand from the AFL union, dismissed 29 employees because they had been suspended from the AFL for non-payment of dues. The first question presented by this proceeding relates to the consequences flowing from these dismissals; if they were made pursuant to an obligation of respondent under the "green book" contract, they do not constitute a violation of Section 8 (3) of the Act and the order of the Board directing an award of back pay is without legal support.

On March 25, 1946, after the Board had set aside the results of its first election, respondent executed a brief memorandum with the AFL which specifically required that all present employees should become members of the union within ten days, and thereafter remain members in good standing, and that new employees should similarly affiliate within ten days of the commencement of their employment, and remain members, as a condition of continued employment. The Board contends that the execution of this memorandum violated the provisions of Section 8 (1) of the Act, solely because of the fact that the Board had not made a final disposition of the proceeding for certification of representatives. The validity of the March, 1946, memorandum under these circumstances, then, constitutes the second issue here before the Court.

III. THE FACTS.

The Board has set forth a rather full statement of the facts upon which the Trial Examiner based his Intermediate Report. To be sure, if we were analyzing the record for the purpose of making the initial resolution of conflicts, our summary would be materially different. However, that stage of the proceeding has been concluded, and the points of difference, in the main, which we could now make would not be of sufficient materiality to affect the ultimate result. We shall therefore make no amplification of the record beyond the factual summary stated by the Board.

IV. THE ALLEGED DISCRIMINATORY DISCHARGES.

As we have already noted, and as the Board states in its Brief, the issue with respect to the discharge of 29 employees designated in the Board order is whether these discharges were an obligation of respondent under the "green book" contract.[1]

The position of the respondent, and of the CP&G, during 1945 was that the "green book" contract made union membership a condition of employment only as to new employees. This view was stated publicly to respondent's employees by F. S. Clough, a representative of CP&G, in August, 1945. (R. 235.) The same view has also been taken by counsel for respondent and CP&G in oral argument to the Board and elsewhere, as pointed out by the Board at pages 29-30 of its Brief. The AFL, however, has at all times vigorously asserted to the contrary. Until the jurisdictional conflict developed in 1945 there was no reason for the conflicting legal interpretations to be resolved, for respondent's plant operated as a *de facto* closed shop. (R. 472-74.) When it became material for the AFL to insist upon the application of its interpretation of the contract it presented its demand to respondent, and on November 20 and 21, 1945, respondent acceded by dismissing the employees who had lost their good standing with the union. The issue thereby became moot. When respondent reverted to its original position in the spring of 1946 and offered to take back the delinquent employees the AFL re-

[1]Section 3 of the "green book" contract is the principal contractual provision involved in this issue. For the convenience of the Court it is set forth in full in the Appendix attached hereto.

newed its earlier stand, and invoked the grievance procedure established by the "green book" contract. The failure of the union to secure the re-adoption of its views by respondent resulted from a break-down in the grievance procedure, rather than from a withdrawal of the union's demands. We point out these facts not to imply that respondent has changed its position with respect to its interpretation of the legal obligations arising under the union security sections of the contract, but to show that the issue is purely one of legal construction of the "green book" rather than one of fact in determining the existence of an extra-contractual condition of employment.

The Board has advanced an extended argument in support of the view that the "green book" contract did not require seniority employees to maintain good standing with the AFL as a condition of employment. If the Board's view prevails the discharges were in violation of Section 8(3) of the Act.

The AFL, on the other hand, argues with equal vigor that all employees—new and seniority—were obligated to maintain good standing with the union as a condition of their continued employment. The AFL points out that in the usual open shop contract a strike or work stoppage by the union to compel unionization is a break of the agreement. It is only in those cases where the employer is obligated by his contract to retain only union employees that the union has a right to exercise economic action to secure dismissal of non-union personnel. There are two ways in which this objective can be accomplished: one, by

the employer's assumption of the obligation to refuse employment to non-union people; the other, by the union's reservation of the right to refuse to work at a job with non-union employees. By either method the result would seem to be the same: the employer hires only persons in good standing with the union, or he risks a work stoppage by the union to secure dismissal of non-union personnel.

The two interpretations of the "green book" are fully explored by the Board, on the one hand, and by the AFL, on the other, and we will not add to the discussion in this Brief.

V. THE EXECUTION OF THE MEMORANDUM OF MARCH 25, 1946, DID NOT VIOLATE SECTION 8 (1) OF THE ACT.

The Board found that the execution of the closed-shop memorandum on March 25, 1946, constituted a violation of Section 8 (1) on the part of respondent. It directs respondent to cease recognizing the AFL as exclusive bargaining representative until the AFL is certified by the Board, and orders respondent to cease discrimination against employees because of membership in any other union, thus requiring respondent to treat with all unions claiming to speak for any of the employees.

The Board's order on this issue, and similarly in numerous other cannery cases, rests upon an extension of a doctrine enunciated in its decision in Matter of Midwest Piping & Supply Co., Inc., 63 NLRB 163.

Much of what we would argue is already before the Court in the Brief for Respondent filed in *NLRB v. Flotill Products, Inc.,* number 11,449 in this Court.[2]

1. **The Law Does Not Require Certification by the Board as a Condition Precedent to Bargaining.**

The normal collective bargaining relationship is initiated without the formality of a Board hearing and certification. In the usual case a union makes a showing to the employer sufficient to convince the employer that it has authority to speak for the employees, and from that point forward the bargaining relationship proceeds. If the union were required to go through a representation proceeding and an election before it could bargain with the employer the Board would be swamped with representation cases. No such folly was intended by the Act.

The Board itself recognizes that a contract with a union lacking a certification is perfectly valid if the union represented a majority at the time the contract was made. In fact, the Board will even presume that the union represented a majority, and will reject proof to the contrary. *Matter of Electro Metallurgical Company,* 72 N.L.R.B. 1396.

2. **The Board's Direction to Bargain with Several Unions is Contrary to Congressional Intent.**

The policy of the Act is to encourage bargaining with representatives of a majority of the employees within a unit. Of necessity this policy precludes a

[2]Respondent is serving copies of the Flotill brief upon the parties to this proceeding at the time this Brief is served.

bargaining with two unions. The impossibility of a dual bargaining relationship was in the minds of the Congress at the time the Act was adopted, and the intent to outlaw it is plain. In discussing the majority rule features of Section 9 (a) of the Act the Report of the Senate Committee on Education and Labor (Senate Report No. 573, 74th Congress, 1st session) says, at page 13:

> "The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is well nigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions."

Again the House Committee on Labor (House of Representatives, Report No. 1147, 74th Congress, 1st session, at pages 20-21) makes the following observations on the principle of majority rule:

"The misleading propaganda directed against this principle has been incredible. The underlying purposes of the majority rule principle are simple and just. As has frequently been stated, collective bargaining is not an end in itself; it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advantageous both to the worker and the employer. There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.

"It would be undesirable if this basic scale should result from negotiation between the employer and unorganized individuals or a minority group, for the agreement probably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining. If, however, the company should undertake to deal with each group separately, there would result the conditions pointed out by the present National Labor Relations Board in its decision in

the Matter of Houde Engineering Corporation (1 N.L.R.B. 35 (Aug. 30, 1934)):

> " 'It seems clear that the company's policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating the object of the statute. In the first place, the company's policy inevitably produced a certain amount of rivalry, suspicion, and friction between the leaders of the committees. * * * Secondly, the company's policy, by enabling it to favor one organization at the expense of the other, and thus to check at will the growth of either organization, was calculated to confuse the employees, to make them uncertain which organization they should from time to time adhere to, and to maintain a permanent and artificial division in the ranks.'

"Speaking of the company's suggested alternative that it deal with a composite committee made up of representatives of the two major conflicting groups, supplemented by other individual employees, the Board pointed out:

> " 'This vision of an employer dealing with a divided committee and calling in individual employees to assist the company in arriving at a decision is certainly far from what section 7 (a) must have contemplated in guaranteeing the right of collective bargaining. But whether or not the workers' representation by a composite committee would weaken their voice and confuse their counsels in negotiating with the employer, in the end whatever collective agreement might be reached would have to be satisfactory to the majority within the committee. Hence the majority representatives would still

> control, and the only difference between this and the traditional method of bargaining with the majority alone would be that the suggestions of the minority would be advanced in the presence of the majority. The employer would ordinarily gain nothing from this arrangement if the two groups were united, and if they were not united he would gain only what he has no right to ask for, namely, dissension and rivalry. * * *' ''

The Act itself is plainly lacking in any declaration, either express or implied, that an employer should terminate an established exclusive recognition during pendency of a representation issue. And the Congress did not want the Board to attempt to write into the Act what Congress had omitted. The Senate Committee said:

> "Sections 7 and 8. Rights of employees—Unfair Labor Practices.——
>
> "These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining. At this juncture the committee wishes to emphasize two points. In the first place, the unfair labor practices under the purview of this bill are strictly limited to those enumerated in section 8. This is made clear by paragraph 8 of section 2, which provides that 'The term "unfair labor practice" means any unfair labor practice listed in Section 8', and by Section 10 (a) empowering the Board to prevent any unfair labor practice 'listed in Section 8.' Unlike the Federal Trade Commission Act, which deals somewhat analogously with unfair trade

practices, this bill is specific in its terms. *Neither the National Labor Relations Board nor the Courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair.* Secondly, as will be shown directly, the unfair labor practices listed in this bill are supported by a wealth of precedent in prior Federal Law." (Report of Senate Committee on Education and Labor, supra, pp. 8-9. Italics added.)

3. The Courts Have Uniformly Frowned Upon the "Cease Bargaining" Doctrine.

(a) Consolidated Edison Company v. N.L.R.B.

The United States Supreme Court has passed upon an almost identical situation in *Consolidated Edison Company v. N. L. R. B.,* 305 U. S. 197, 83 L. ed. 126.

On May 5, 1937, a CIO union filed a charge with the Board alleging that Consolidated Edison Company was violating the Act in interfering with employee organization, and in supporting an AFL union. Between May 28, 1937, and June 16, 1937, the Company executed its first collective bargaining agreements with the AFL — contracts which for the first time recognized the AFL as the representative of its members, established wages and working conditions, and contained no-strike provisions. The proceeding initiated by the CIO was pending before the Board at the time these agreements were negotiated. Following a hearing to which the AFL was not made a party the Board issued an order which, among other provisions, found that the Company had not dominated or interfered with any labor organization, and

directed that the Company cease giving effect to its AFL contracts. The AFL union represented about 80 per cent of the employees eligible for membership in it. The Board sought to justify its order setting aside the AFL contracts on the ground that it would effectuate the policies of the Act, under Section 10 (c). On this issue the Court made this statement which is most significant here:

> "Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of § 10 (c). That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." (305 U.S. at pp. 235-36; 83 L. ed. 143.)

The Court goes on to indicate that a majority once established and recognized by the employer retains its standing until another agency supplants it in the manner set out in the Act.

> "The Board by its order did not direct an election to ascertain who should represent the em-

ployees for collective bargaining. Section 9 (c). Upon this record, there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to 'affect commerce' in the sense of the Act so as to justify their abrogation by the Board. *The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period.*

"We conclude that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order.

"Subdivision (g) of that paragraph, requiring the companies to cease recognizing the Brother-

> hood 'as the exclusive representative of their employees' stand on a different footing. The contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise. Section 9. We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law." (305 U.S. 237, 238-39; 83 L. ed. 144, 145 (Italics added.).)

The logic of the Supreme Court's decision is directly applicable here.

(b) N.L.R.B. v. McGough Bakeries Corp.

N.L.R.B. v. McGough Bakeries Corp., 153 F. (2d) 420, involved a contest between a CIO union and an independent union. In 1942, at a time when the CIO was the only labor organization contesting for the right to represent employees, a strike had been called and to induce resumption of work the employer agreed to a closed-shop contract, with the CIO. Both the Board and the Circuit Court of Appeals determined that the closed-shop contract was invalid because the CIO was not shown to be the representative of a majority of the employees at the time it was made. Dur-

ing this period the Board declined to investigate the question of representation because only one union claimed bargaining rights.

The closed-shop agreement with the CIO was renewed on May 10, 1942, for a three year period. In February, 1943, some of the employees established an independent union and asked for bargaining privileges, claiming to represent a majority. The Company refused to negotiate with the Independent because of the outstanding closed-shop contract, and suggested that the Independent file a representation petition with the Board. Such a petition was filed by the Independent on March 5, 1943, but the CIO filed a charge that the Independent was company-dominated. The Board did not act on either petition. On May 15, 1943, after expiration of the CIO contract, the Independent and the Company commenced bargaining with the result that a closed-shop contract was signed with the Independent for the first time. Discharges made pursuant to the Independent's closed-shop contract served as the basis of a complaint issued by the Board.

The Board found that the Independent was company-dominated, made no finding as to whether the Independent represented a majority at the time its contract was signed in May, 1943, and applied the Midwest Piping doctrine, saying:

> "However, on May 15, 1943, shortly after the expiration of the (CIO) Union's closed-shop contract, *notwithstanding the pendency of the aforementioned representation petition* and unfair la-

> bor practice charge, the respondent, hastily and without requiring proof of the Independent's alleged majority status, entered into an illegal closed-shop contract with the Independent, as found in the Intermediate Report." (Italics added.)
>
> 58 *N.L.R.B.*, 848, 851.

The Circuit Court held that as a matter of law the record demonstrated that the Independent represented a majority of the employees at the time of its closed-shop contract in May, 1943, and that the record failed to show it to be company-dominated, stating:

> "The trial examiner next brings forward the fact that the Independent was contracted with. *It had a right to be, since it was in fact the majority representative.*"
>
> 153 F. (2d) at 424.

The Board, at pages 19-20 of its Brief in the *Flotill* case (footnote 9), has anticipated our reference to the *McGough* case with the declaration that it "simply did not involve an adjudication of the validity of the doctrine of the instant case". On the contrary, the Board invoked the Midwest Piping doctrine, but the Court, although not making direct reference to it, upheld the questioned contract because it was made with a union entitled to speak for all the employees. Significantly, too, in the *McGough* case the action which the Board questioned and which occurred during the pendency of the representation issue consisted of an exclusive recognition by the employer and a closed-shop contract. With but a single act the em-

ployer gave the Independent virtually all that could be given to it.

The Board would have this Court ignore the pendency of the representation issue as a factor in the *McGough* case because "* * * the Board did not thereafter act upon the petition because preliminary investigation indicated to it that the contracting union was illegally dominated. The unprocessed petition was regarded as having lapsed at the time the contract was entered into." Careful reading of the Trial Examiner's Intermediate Report, the Board's Decision and Order (58 N.L.R.B. 848), and the Circuit Court's opinion fails to show any basis whatsoever for these statements by the Board's counsel in its briefs.

4. Two Cases Decided by this Court are Contrary to the Board's Decision in this Case.

On at least two occasions this Court has declined to approve the "well established principle" invoked by the Board.

(a) N.L.R.B. v. Pacific Greyhound Lines, Inc., 106 F. (2d), decided September 19, 1939.

In December, 1936, the Board had issued an order directing Pacific Greyhound to cease discouraging membership in the Brotherhood of Enginemen or any other labor organization, from encouraging membership in the Drivers Association or any other labor organization, and from otherwise dominating any labor organization or interfering with the rights of employees under the Act. The Board's order was thereafter enforced by decree of this Court.

Upon entry of the decree both the Enginemen and the Drivers Association ceased to have any relations with Greyhound or its employees. At a time prior to April 21, 1937, a number of employees affiliated with the Amalgamated Association of Street, Electric Railway and Motor Coach Employees, and a collective bargaining agreement was executed by Amalgamated and Greyhound. On September 7, 1937, a new agreement was signed, to remain in effect until December 31, 1938. This provided for the exclusive recognition of the Amalgamated, and was self-renewing in the absence of 60 days' notice prior to December 31. At the same time it was agreed that within 30 days after approval of the arrangement by the members of Amalgamated and notice thereof to Greyhound, membership in the union would be required as a condition of employment. This arrangement became effective by agreement on April 15, 1938.

In June, 1938, a new union entered the picture, the Brotherhood of Railway Trainmen. The Trainmen and Amalgamated both filed petitions for certification with the Board, and, following a hearing, the Board issued a direction of election on October 29, 1938. Prior to the elections and on or before October 31, 1938, the closed-shop agreement was extended for an additional year and was modified so that it could be terminated by either Greyhound or the then bargaining agent for the men, Amalgamated, on 60 days' written notice from either party to the other.

The Board claimed that this modification constituted a violation of this Court's earlier decree, and

sought to have Greyhound adjudged in contempt. Greyhound moved to dismiss the Board's petition upon the ground that it did not set forth facts showing a violation of the decree. This Court granted Greyhound's motion, and on the subject of the effect of the pendency of the representation question upon the modification of the agreement in October, 1938, had this to say:

> "We are unable to find in this modification of the agreement any justification for the Board's charge that it constituted a contempt of our decree or any violation of the Act. On the contrary, it seems in aid of the Act's declared purpose of a speedy disposition of labor disputes. *We regard the contract, as modified, then to be binding on the employees and on the company and not affected by the fact that undetermined proceedings were pending before the Board.* Consolidated Edison v. N.L.R.B., 305 U.S. 197, 237."
>
> 106 F. (2d) at p. 869. (Italics added.)

The Board asserts that the *Greyhound* case did not involve the Board's cease bargaining doctrine. A careful examination of the pleadings and briefs in that case discloses that the Greyhound Company argued that the law did not require it to cease bargaining collectively with the Amalgamated despite the pendency of the representation proceedings while the Board argued that to continue to bargain collectively with the Amalgamated during the pendency of the representation proceedings was contrary to law, and likewise contrary to the decree of this Court. This Court in dismissing the Board's petition held ex-

pressly in the language quoted above that it regarded the contracts as binding on the employees and on the company, and not affected by the fact that representation proceedings were pending before the Board, citing the *Consolidated* case. The cease bargaining doctrine, therefore, was considered and explicitly rejected by this Court in the *Greyhound* case.

(b) N.L.R.B. v. Bercut-Richards Packing Co., C.C.A. 9, No. 9499, decided July 15, 1946.

On May 23, 1946, the Board filed with this Court in the above case its "Petition For Rule To Show Cause, To Adjudge In Contempt And For Other Relief". In sum the Board requested the Court to find that certain activities of the California Processors and Growers, Inc., its members and certain specifically named canners, principally the renewal and enforcement of their contract with its union shop provisions, violated a decree of the Court entered on July 15, 1940. The petition sets out at some length the conduct alleged to be a violation of the decree. It is sufficient for present purposes to say that the petition recites in detail the claim of the Board, which is the principal basis of the proceeding here before the Court, that during the pendency of the representation proceeding the employers could not without violating the law (and the decree) renew their contract with the AFL and continue to make it effective.

The respondents filed a lengthy return and answer to the Board's petition which related at considerable length the history of the relationship between respondents and the AFL, and which vigorously de-

fended the continuance of the bargaining relationship during the pendency of the representation issue. The AFL was granted leave to file a petition in intervention which raised the same issue.

The Board moved to strike the respondents' answer and asked for a summary adjudication on the pleadings, claiming that the admission of continued bargaining pending the representation issue constituted a minimum showing of a violation of the decree. (Board's Motion to Strike, etc. proceeding No. 9499, pages 9-10.) Briefs were filed in which the principal issue discussed was whether continued recognition of the AFL after March 1, 1946, while the representation question was unresolved, was a violation of the decree and the Act. (The parties treated the decree and the Act as coextensive for the purposes of that proceeding.)

On July 15, 1946, this Court denied, without opinion, the Board's petition to adjudge the respondents in contempt. The Board requested a clarification on July 23, 1946, upon the stated ground the Board could not determine whether the Court's action was intended to decide the legality of the execution of the 1946 contracts and thereby bar the Board from questioning these contracts in other proceedings then pending before the Board. The request for clarification was likewise denied.

Under these circumstances we take the dismissal of the contempt proceeding to be an adjudication on the merits, under Rule 41 (b) of the Federal Rules of

Civil Procedure which by rule of this Court have been made applicable.

> "* * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

Compare

Napa Valley Electric Company v. Railroad Commission, 251 U. S. 366, 64 L. ed. 310;

Lyons v. Perrin & Gaff Manufacturing Co., 125 U. S. 698, 31 L. ed. 839.

By rule the presumption is thus conclusive and irrebuttable that the disposition of the contempt case constituted an adjudication of the validity of the 1946 contract between the AFL and other California canners, and that the continuance of negotiations while the Board attempts to dispose of a representation question does not violate the National Labor Relations Act. Because of the identity of the issues the contempt adjudication is a decision directly in point rejecting the Board's "cease bargaining" doctrine.

CONCLUSION.

Inasmuch as respondent has already expressed for the record, as well as concurrently with the discharges involved in this order, the view that the "green book" contract did not require dismissal of non-union senior-

ity employees we do not now propose to do an about-face in our argument to the Court. The proper construction of that contract is a question of law for the Court to resolve, and the conflicting views are being stated by the Board and the AFL.

Respondent strenuously objects to that portion of the order which in effect requires it to attempt the impossible of bargaining on equal terms with all unions who may step forward with a claim on behalf of any of the employees within the bargaining unit. Such an order, we submit, is contrary to the intent of Congress, conflicts with decisions of this Court, and as a matter of law cannot "effectuate the policies of the Act."

Dated, Oakland, California,
November 10, 1948.

Respectfully submitted,
J. Paul St. Sure,
Edward H. Moore,
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G. W. Hume Company.

(Appendix Follows.)

Appendix.

Appendix

SECTION 3. Preference of Employment and Hiring Practices.

(a) It is recognized that the refusal of Union members to work with non-union employees who are within the jurisdiction of the local Union shall not constitute a violation of this agreement, provided, however, that before any strike action, job action or other direct action is taken on this account, the local Union will submit the matter for adjustment as provided in Section 8 hereof. In order to aid in the prompt adjustment of such matters, the Union shall furnish its members with a clearance card, dues book or other evidence of paid-up membership, and when employees who are on the seniority lists, as defined in Section 9 hereof, are called to work, the Employer will request that such evidence be presented by those who have it, and will keep a record, which will be available to the Union, of all employees who do not present such evidence. Similarly the Union will from time to time, when such information is available, notify the Employer of the names of delinquent or suspended members, or other non-union employees, according to Union records.

The Employer shall be the sole judge of the qualifications of all of its employees, subject to appeal as provided in Section 8 hereof, but in the selection of new employees the Employer will give preference of employment to unemployed members of the local

union, provided they have the necessary qualifications and are available when new employees are to be hired. "New Employees", for the purpose of this agreement, are defined to be persons who are not on the seniority list of the hiring plant, as defined in Section 9 hereof, even though they may have been employed previously by said plant. As a basis for preferential consideration as new employees as aforesaid, unemployed members of the local union shall be required to present a clearance card from the local union evidencing the fact of their paid-up membership. [If such union members are not available for such employment, the Employer may hire any person not a member of the Union provided that such person will be required to file an application for membership in the local union before being put to work. Upon filing such application he shall receive from the Union a written statement that he has made such application, which statement shall be taken up by the Employer and returned to the Union when the applicant is put to work. It is further understood that such person must become a member of the local union within ten (10) days after his employment, and that the local union will not unreasonably refuse to accept such person as a member.][1]

(b) The following rules and practices shall govern in carrying out the foregoing provisions of this Section relating to preferential employment and to hiring new employees:

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[1]Matter in brackets was modified by Section 1 of the Supplementary Emergency Agreement.

(1) A central authority, responsible for hiring and firing, shall be established and maintained in each plant of the employer which, under Section 2 hereof, is subject to the provisions of this agreement. Such plants shall be known as "member plants". Each member plant shall furnish the appropriate local union and the California Processors and Growers, Inc., with the name of the person assigned by such member plant to the responsibility of acting as such central authority.

The person assigned to the responsibility of acting as such central authority shall have full authority for hiring and firing and shall be available at all proper times to carry out the purposes of this agreement, and the Employer agrees that the person so assigned shall not have conflicting duties which will interfere with his availability.

(2) At the beginning of the operating season for processing perishable products, whether fruits or vegetables, and upon the resumption of operations during such operating season after any shut down lasting two weeks or more, the respective member plants of the Employer will give local union office written notice of beginning or resuming operation equivalent in time to that given to registered workers on the seniority list of such plants, and at least 48 hours before such operations start provided such information is available to the Employer in time to fulfill this requirement. In case of a shut down of less than two weeks, the local union office will be given the same length of notice of resumption of work as that given

to employees of the plant concerned. Information concerning the probable or actual termination of any operating season, and of shut downs for substantial periods of time during such season, will be furnished to the local Union by the Employer when and to the extent that such information is available. In the event that an Employer gives notice that no further processing operations are to be undertaken after the completion of operations on any particular product in a given season, and employees are thereafter laid off for lack of work, any such employees having seniority who are subsequently recalled to work in said plant during said season on account of the resumption of processing operations, and who fail to report, shall not lose their seniority rights as provided in 9 (h) hereof, but shall be deemed to have a reasonable excuse for such failure to report.

(3) During the operating season, and at the beginning of each work shift or day, the local union undertakes to have available, at member plant subject to this agreement, sufficient qualified members of the appropriate local union to fill normal vacancies. If such members are not available at such plants, other persons may be hired as herein provided.

(4) During any day or shift, if there is an increase in volume of work which necessitates the hiring of five or more additional employees, the local union will be given at least two hours' notice of such need, to enable said union to make available sufficient qualified local union members, before other persons are hired as

herein provided. To aid in the practical application of this provision and to avoid unnecessary calls at night, the local union will furnish the appropriate central hiring authority, in plants operating night shifts, with a list of currently available local union members whenever possible to do so.

The foregoing procedure shall apply during the operating season for processing perishable products, whether fruits or vegetables, and shall likewise apply during the non-processing season with the exception that during such portion of the year the procedure shall apply to the hiring of any or all additional employees, rather than to "five or more additional employees" as provided during the processing season.

(5) Each local union will provide a practical method for receiving notices herein provided, and Employer will be released from obligation under these rules if notice is given but not availed of by the local union concerned, or if no one is reasonably available to receive notice.

(6) When hiring "new employees" (as defined in Section 3 (a) hereof) if qualified members of the appropriate local union are not available, the Employer will require applicants for work to follow the procedure described in Section 3 (a) hereof before being put to work, and will advise such applicants of the provision of this Section requiring affiliation with said union within ten (10) days after actual employment. The local union agrees to have

a representative available for receiving union applications at times designated by the member plant central hiring authority for employing new workers, and the local union agrees to assume responsibility for completing the matter of subsequent affiliation by such new workers as members of the Union.